Supreme Court, U.S.
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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WILLIAM H. SULLIVAN, JR.,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,
Respondents.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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CROSS-PETITION FOR A WRIT OF CERTIORARI

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January 9, 1995

QUESTIONS PRESENTED

1. Does the "equal involvement" defense to antitrust liability require a showing that the illegal conspiracy would not have occurred but for the plaintiff's participation?

2. Did the court below fail to apply properly the two criteria for determining equal involvement set forth by this Court in *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985), where the plaintiff did not participate in the formation of the conspiracy, where his participation in its continuation was limited to acquiescence, and where he advocated abandonment of the conspiracy before bringing suit?

3. In assessing the legality of a challenged restraint under the Rule of Reason, should the factfinder balance only the procompetitive and anticompetitive effects of the restraint in the relevant market or may it justify an anticompetitive restriction in the relevant market by taking into account procompetitive effects in other markets?

PARTIES TO THE PROCEEDING

Respondents, who were defendants below, are the National Football League and twenty-one of its twenty-eight member clubs.* Petitioner, who was plaintiff below, is William H. Sullivan, Jr.

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* Respondent members of the National Football League own franchises in the following cities and areas: Atlanta (The Five Smiths, Inc.), Buffalo (Buffalo Bills, Inc.), Chicago (Chicago Bears Football Club, Inc.), Cincinnati (Cincinnati Bengals, Inc.), Cleveland (Cleveland Browns, Inc.), Dallas (Dallas Cowboys Football Club, Ltd.), Denver (PDB Sports Ltd.), Detroit (The Detroit Lions, Inc.), Green Bay (Green Bay Packers, Inc.), Houston (Houston Oilers, Inc.), Indianapolis (Indianapolis Colts, Inc.), Los Angeles (Rams) (Los Angeles Rams Football Co.), Minneapolis (Minnesota Vikings Football Club, Inc.), New Orleans (New Orleans Saints, Ltd.), New York (Jets) (New York Jets Football Club, Inc.), Phoenix (B&B Holdings, Inc.), Pittsburgh (Pittsburgh Steelers Sports, Inc.), San Diego (Chargers Football Co.), Seattle (Seattle Professional Football Club, Inc.), Tampa Bay (Tampa Bay Area NFL Football, Inc.), and Washington, D.C. (Pro-Football, Inc.).

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Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Petitioner William H. Sullivan, Jr. hereby cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. This cross-petition is not intended to be conditional on the Court's acceptance of the petition filed by the National Football League ("NFL" or "league") and the 21 of its member clubs named as parties, docketed as No. 94-1048.

OPINIONS BELOW

The opinion of the court of appeals is reported at 34 F.3d 1091 and appears in Appendix A to the "Petition For A Writ of Certiorari"

(Dec. 1994) in Docket No. 94-1048 ("Pet."), previously filed by respondents. The decision of the district court denying the motion to dismiss is reported at 795 F.Supp. 56 and appears in Appendix B to the petition. The decisions of the district court denying the motions for summary judgment, directed verdict, and judgment as a matter of law appear in Appendices C, D, and E, respectively, to the petition.

JURISDICTION

The judgment of the court of appeals is dated September 16, 1994. A petition for rehearing was filed by the petitioners on September 30, 1994 and was denied on October 26, 1994, in an order that made changes to the court's original opinion. *See* Appendix F to the petition.

Jurisdiction in the district court was premised upon 28 U.S.C. §§1331 and 1337. Jurisdiction in this Court is based on 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

I. INTRODUCTION.

This cross-petition asks the Court to review two aspects of the decision below. The first aspect involves the application of the "equal involvement" defense to antitrust liability and the district court's failure to instruct the jury on that defense. The First Circuit held that the defense does not require a showing that the challenged restraint would never have occurred but for an antitrust plaintiff's participation. 34 F.3d at 1108 & n.8; Petitioners' Appendix in Docket No. 94-1048 ("Pet.App.") 29a-30a & n.8. In so doing, it rejected contrary precedent from the Ninth Circuit (and, implicitly, the Eighth Circuit as well). The

court below also erred in determining that under the standards announced by this Court in *Bateman, Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985) ("*Bateman Eichler*"), there was sufficient evidence to go to a jury on the complete involvement defense and no impeding of the effective enforcement of the antitrust laws by allowing that defense. This cross-petition also asks the Court to review the issue of whether, under a Rule of Reason analysis, the factfinder should balance only the procompetitive and anticompetitive effects of the restraint in the relevant market or whether it should also consider alleged procompetitive effects in other markets as well. The First Circuit deemed the precedent on this topic, including opinions by this Court, to be confused. *See* 34 F.3d at 1111-13; Pet.App. 37a-40a. Clarification of this important issue is therefore warranted.

The court below listed other errors as well in reversing the verdict of the jury. The only error it found to be independently prejudicial, however, was the trial court's failure to instruct the jury on the equal involvement defense. 34 F.3d at 1107 n.6; Pet.App. 28a n.6. Therefore, if this Court reverses the First Circuit on this point, the case would need to be remanded to the court of appeals in order to determine whether the verdict should be reinstated or whether any of the other errors found, either alone or together, were serious enough to warrant reversal.[1]

II. FACTUAL BACKGROUND OF THE CASE.

This case involves an antitrust challenge by the former owner of the New England Patriots ("Patriots") football club to the NFL's uncodified policy banning entirely public ownership of member franchises, including ownership by public corporations. The Patriots had formerly been a member of the old American Football League ("AFL"), which had no restriction against public ownership.[2] Joint

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[1] As respondents have noted, "[i]t is not uncommon for the Court to grant certiorari to review decisions in appropriate cases where the decision below, if left standing, would result in a trial." Pet. at 7 n.5.

[2] Nor do other major professional sports leagues--such as the National Basketball Association or Major League Baseball--have rules barring public ownership of major franchises. J.A. 496-97; S.A. 92-93, 213-14; Exh. 1108 at 9.

Appendix to the First Circuit ("J.A.") 451-52, 504. From 1960 to 1976, the club was publicly owned. *Id.* In 1976, petitioner bought out the public shareholders, partly at the behest of NFL officials. *See* Trial Exh. ("Exh.") 1233 at 5. The publicly-owned status of the Patriots had been "grandfathered" as an exception to the public ownership ban when the AFL merged into the NFL in 1966, subject to the understanding that the club would eventually be brought into compliance with the league's policy. J.A. 469, 567; Supplemental Appendix to the First Circuit ("S.A.") 108.

In December of 1986, the Boston Celtics professional basketball club made a public offering of 2.6 million limited partnership units at $18.50 per share. Exh. 1108. Petitioner desired to do something similar by making a public offering of 49 percent of the Patriots and therefore raised the issue of modifying the NFL's public ownership ban at a league meeting held in October of 1987. At that meeting, petitioner expressed support for a proposal previously presented by another NFL club owner that would permit public corporations to own stock in NFL teams. *See* Exh. 12. He also presented an alternative modification that read as follows:

> "A member club may transfer not more than 49% of its outstanding equity by means of a sale to the public of units in a master limited partnership or stock in a corporation, providing that any future transactions relating to the remaining control units in the limited partnership or control shares in the corporation would continue to be subject to the provisions of Article III of the Constitution and By-Laws." (Exh. 33 at 00000833.)

Discussion of these proposals was tabled at the October league meeting. Exhs. 33, 33A, 1801, 1805. Petitioner thereafter sought to obtain the votes of 21 of the NFL's 28 club owners for his proposed modifications, in accordance with Article 3.5 of the NFL's constitution and bylaws, which requires that three-fourths of the members of the league approve any transfers of ownership of, or ownership interests in, a member club. He was unable to obtain the requisite supermajority and former NFL Commissioner Pete Rozelle indicated that he would not support and might oppose the proposals and that any continuing efforts to change the league's ban on public ownership were futile. J.A. 610, 659-60; Exh. 36. Petitioner sold the Patriots in October of 1988 for

approximately $83.7 million, less than the team's true worth, especially in a market that included public investors. The NFL's policy thus prevented him from maintaining a majority share of a rapidly appreciating asset. In 1994, the Patriots were sold for a reported $165 million, then the highest price ever paid for an NFL club.

III. PROCEEDINGS IN THE COURTS BELOW.

A. History Of The Lawsuit.

Petitioner filed the present lawsuit in May of 1991, alleging that the NFL's public ownership ban and the steps taken to enforce it violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), as well as state law. After denying motions to dismiss and for summary judgment, the district court for the District of Massachusetts (the Honorable Edward F. Harrington, Jr.) conducted a jury trial in September and October of 1993 that extended for 22 court days.

The jury found that the NFL's ban on public ownership violated Section 1 of the Sherman Act, and had caused injury to petitioner in the amount of $38 million before trebling. In post-trial proceedings, the district court denied motions for judgment notwithstanding the verdict and for a new trial, but remitted the damage award to $17 million. On appeal, in a unanimous opinion authored by Chief Judge Juan Torruella, the First Circuit reversed and remanded the case for a new trial. The appellate court ruled that the NFL and its member clubs were not entitled to judgment as a matter of law, but found that the trial court's failure to give a jury instruction on the equal involvement defense constituted reversible error, in conjunction with other errors, including the failure of the verdict form to advise the jury that it could consider the procompetitive benefits of the public ownership ban in markets other than that for the sale of ownership interests in NFL clubs.

B. Evidence And Proceedings Relating To The Complete Involvement Defense.

At the trial below, petitioner presented evidence that the NFL had long maintained a ban on public ownership of member clubs. That ban became applicable to teams in the former AFL when the two leagues merged in 1970. J.A. 457, 469, 475, 488; Exh. 3 at 82. He further showed that the continuation of the ban was agreed to by Tex Schramm

(on behalf of the NFL) and Lamar Hunt (on behalf of the AFL) without his prior consent. J.A. 462, 509-12. Former NFL Commissioner Pete Rozelle testified, by the time the merger was announced and a joint AFL-NFL Committee was designated to facilitate the merger, any issue as to the merged league's ownership policies was "put to bed." J.A. 1432. While petitioner served on that Committee, it took no action on the league's public ownership policy; indeed, on one occasion when a mention of that policy did arise, petitioner testified that an NFL representative stated "that the NFL rules were going to guide the procedure and, in effect, if we didn't like it, we could take a walk." J.A. 518. Thus, petitioner had no equal responsibility for initiating the public ownership ban.

From 1970, when the NFL commenced operations, to his sale of the Patriots in 1988, the trial record showed that petitioner never voted to maintain the public ownership ban or to enforce it against other clubs. Proposals to change the policy surfaced in 1971, but were never brought to a vote. In the 1980s, the owner of the St. Louis (now Phoenix) Cardinals proposed liberalizing the league's public ownership policy, and petitioner testified that he supported that proposal. J.A. 519-21. This proposal, as well as another to permit minority public ownership, came up for consideration at three league meetings in 1985 and one in 1987, but, on each occasion, the proposals were deferred or tabled by the NFL Finance Committee (of which cross-petitioner was not a member) or league officials. Exh. 1227 at 2; Exh. 1380 at 12; Exh. 1597 at 12; Exh. 1598 at 3. *See* J.A. 520-22. Thus, with respect to league member action on the ban, there is not a scintilla of evidence that petitioner did anything more than acquiesce in its continued existence, up to the mid-1980s. During that time period, no league member sought the NFL's approval to sell ownership interests to the public, so there was no occasion for petitioner to seek to impose the ban against one of his competitors. Consequently, petitioner also bore no equal responsibility for maintaining the public ownership ban.

It is true that he cited that policy as one of several bases for buying out the public shareholders of the Patriots in 1976. But, as noted above, he did so in response to pressure from the league. Even the First Circuit has recognized that partial reliance on a challenged antitrust violation in soliciting business does not result in equal or complete involvement in that violation. *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 856 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) ("*CVD*").

Moreover, even if petitioner could somehow be said to have supported the public ownership ban in the 1970s, he did not support it by 1985-87, when the NFL's relations with players, as well as the costs being incurred by its member clubs, had changed radically. Courts have held that a party can withdraw from a conspiracy and recover damages for the period after such withdrawal. *See South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 784 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Board of Regents of Univ. of Okla. v. National Collegiate Athletic Ass'n*, 546 F.Supp. 1276, 1335 (W.D.Okla. 1982), *aff'd in part and remanded in part on other grounds*, 708 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 84 (1984). Petitioner's request that the NFL's public ownership policy be changed so that he could sell ownership interests in the Patriots to the public constitutes such a withdrawal, even assuming *arguendo* that he was part of any conspiracy to maintain that policy. The damages that he asserted at trial, and which the jury awarded, all occurred after that date.

Based on this evidence in the trial record, petitioner moved for a directed verdict on the equal involvement defense, which the trial court initially denied. However, the court then basically reconsidered its ruling, saying that it would not instruct the jury on the defense because petitioner's participation in the formulation of the NFL's public ownership policy was "minimal" and that policy was "imposed" on him by the league. J.A. 1515.[3] The court did allow the NFL to argue to the jury that petitioner's participation in the policy, to the extent there was any, demonstrated its reasonableness, something which it did. As noted above, however, the First Circuit ruled that failure to instruct on the defense was prejudicial error, since the evidence presented a jury issue.

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[3] This was by no means an unusual procedure. The equal involvement defense is often disposed of summarily in the context of motions for directed verdict, summary judgment, or dismissal. *E.g.*, *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 756 (3d Cir. 1990) (upheld directed verdict); *Bieter Co. v. Blomquist*, 848 F.Supp. 1446, 1450 (D.Minn. 1994) (dismissal); *Comeau v. Rupp*, 810 F.Supp. 1127, 1160 (D.Kan. 1992) (summary judgment); *Cooper Dev. Co. v. First Nat'l Bank*, 762 F.Supp. 1145, 1159 n.20 (D.N.J. 1991) (dismissal); *Welt v. Moses (In re Cascade Int'l, Inc.)*, 165 B.R. 321, 325 (Bkrtcy., S.D.Fla. 1994) (summary judgment).

C. Proceedings Relating To The Issue Of Procompetitive Restrictions In Other Markets.

The trial court instructed the jury generally to weigh the harmful effects and alleged benefits of the public ownership ban in determining its reasonableness. S.A. 259. In the verdict form, the jury was asked to determine if petitioner had proven his alleged relevant market for the purchase and sale of ownership interests in NFL member clubs and, if so, whether the public ownership ban had an actual and substantial harmful effect on competition in that market, and whether such harmful effects "outweighed any beneficial effect of the contract [the ban] on competition in the relevant market." The NFL never challenged the market definition below (34 F.3d at 1097 n.1; Pet.App. 7a n.1), but did object to the portion of the verdict form requiring consideration of the allegedly procompetitive effects of the public ownership policy in the relevant market. When this point was reiterated in a post-trial motion, the district court rejected the NFL's objection on the basis of this Court's opinion in *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) ("*NCAA*"). *See* Appendix. The First Circuit ruled, however, that on retrial, the reference to the relevant market in the portion of the verdict form quoted above should either be deleted or the jury should be advised that it could consider alleged "indirect" procompetitive effects of the challenged restraint. 34 F.3d at 1113; Pet.App. 41a.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S REJECTION OF A "BUT FOR" STANDARD OF CAUSATION TO DETERMINE EQUAL INVOLVEMENT CONFLICTS WITH PRECEDENT IN TWO OTHER CIRCUITS.

The First Circuit's opinion concerning the "equal involvement" defense is at odds with precedent in two other circuits. To explain the split among the circuits, some background about the defense is necessary.

In *Perma Life Mufflers v. International Parts Co.*, 392 U.S. 134 (1968) ("*Perma Life*"), this Court held that the defense of *in pari delicto* should not be recognized in federal antitrust actions. *Id.* at 140. The

Court reserved decision on the question of whether one who "aggressively support[ed] and further[ed] the monopolistic scheme as a necessary part and parcel of it" could be barred from seeking treble damages. *Id.* Five justices in separate opinions indicated that a defense based on truly equal responsibility for the antitrust violation--whether or not denominated *in pari delicto*--should be recognized. *Id.* at 145 (White, J., concurring); *id.* at 147-48 (Fortas, J., concurring); *id.* at 148-49 (Marshall, J., concurring); *id.* at 154-55 (Harlan, J., joined by Stewart, J., concurring).

After *Perma Life*, the circuit courts, for the most part, recognized an antitrust defense based on equal involvement in the alleged violation, but differed in determining how that level of involvement was to be measured. *See Bateman Eichler*, 472 U.S. at 305 & n.10. Some courts focussed on whether the parties were equally responsible for creating *and* establishing or executing the illegal scheme. *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 902 (5th Cir. 1979), *aff'd sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 15-16 (4th Cir. 1971); *Premier Elec. Constr. Co. v. Miller-Davis Co.*, 422 F.2d 1132, 1138 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970). As petitioner indicated to the court below, the Ninth Circuit adopted a somewhat different approach in cases such as *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977), holding that "[a] plaintiff is barred from recovery only when the illegal conspiracy would not have been formed but for the plaintiff's participation." It viewed this "but for" test as a particularized standard of causation to be used in determining equal involvement. *Id.* at 279-80 n.3 (citing *Perma Life*, 392 U.S. at 146 (White, J., concurring)). Subsequent Ninth Circuit antitrust decisions continue to apply this "but for" standard. *E.g., Southwest Marine, Inc. v. Campbell Indust.*, 732 F.2d 744, 746 (9th Cir.), *cert. denied sub nom. Triple "A" Machine Shop, Inc. v. Southwest Marine, Inc.*, 469 U.S. 1072 (1984); *THI-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 995 (9th Cir. 1980). An identical test has been adopted by the Eighth Circuit. *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1262 n.10 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980).

As noted above, the First Circuit flatly rejected the "but for" standard. The Seventh Circuit has also noted differences among the circuit courts on this issue. *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 830 F.2d 716, 720 (7th Cir. 1987) ("*General Leaseways*"). *See also* I ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 699-700 (3d ed. 1992) (noting differences among circuits). The First Circuit reasoned that the "but for" causation test was not consistent with this Court's opinion in *Bateman Eichler*. That is not the case, however.

Bateman Eichler was a securities case where a defrauded tippee sued an insider-tipper for violations of Section 10(b) of the Securities and Exchange Act of 1934 (15 U.S.C. §78j(b)) and the Securities and Exchange Commission's Rule 10b-5 (17 C.F.R. §240.10b-5). The trial court dismissed the complaint, finding the plaintiff was equally involved in the unlawful scheme. The Ninth Circuit reversed, applying the "but for" standard of causation to determine when equal responsibility for an alleged securities violation exists. *Berner v. Lazzaro*, 730 F.2d 1319, 1322-23 (9th Cir. 1984). This Court affirmed that reversal. It confirmed that a defense of complete involvement did exist after *Perma Life*. To establish that defense, a defendant had to prove that as a "(1) direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress and (2) preclusion of suit would not significantly interfere" with effective legal enforcement. 472 U.S. at 310-11. The Court did not purport to define definitively what constitutes "substantially equal responsibility" and did not reject the "but for" standard of causation advanced by the Ninth Circuit. Instead, it simply noted that the responsibility of a tippee was not coequal with that of an insider-tipper, since the latter was the primary violator of the securities laws. In short, *Bateman Eichler* does not undermine the reasoning of *Javelin* and other Ninth Circuit cases adopting the "but for" standard, since the standard is simply a way of articulating causation in the context of determining substantially equal responsibility.[4] *See* 3 LEONARD SAND, JOHN SIFFERT, STEVEN REISS, JOHN SEXTON & JEFFREY THORPE, MODERN FEDERAL JURY INSTRUCTIONS 79-175 (1994). Indeed, Professors Phillip

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[4] The Seventh Circuit in *General Leaseways* certainly viewed *Javelin* as setting forth still applicable law in the Ninth Circuit, as did the ABA Antitrust Section treatise cited above.

Areeda and Herbert Hovenkamp have found *Javelin* and its progeny to be among the cases in accord with *Bateman Eichler*. II PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶390 at 348-49 (1994 rev. ed.).

There is also a sound policy reason to make the "but for" standard of causation the appropriate one for determining whether substantially equal involvement exists. As the Ninth Circuit said in *Javelin*:

> "The 'but for' standard places a high burden of proof upon any defendant seeking to bar the plaintiff's suit on the basis of joint participation. But the plaintiff is suing not only in its own behalf, but as a 'private attorney general' representing the public interest. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 . . . (1955); *Olympic Refining Co. v. Carter*, 322 F.2d 260, 264 (9 Cir.), *cert. denied*, 379 U.S. 900 . . . (1964). Congress established the private remedy to enlist the public as enforcers of the antitrust laws. The courts should encourage this function." (546 F.2d at 279-80; footnote omitted.)

Utilizing this test of causation, a directed verdict should have been granted for petitioner on this defense. As the First Circuit implicitly recognized by rejecting the test, the NFL's public ownership ban existed and would have existed independently of petitioner's alleged involvement. Based on the factual record summarized in Section III.B of the Statement of the Case, no reasonable juror would have concluded otherwise. The cross-petition for certiorari should therefore be granted and this portion of the First Circuit's opinion should be reversed.

II. EVEN IF THE "BUT FOR" STANDARD OF CAUSATION IS INAPPLICABLE, THE COURT BELOW MISAPPLIED BATEMAN EICHLER AND ITS PROGENY.

Even assuming *arguendo* that the "but for" standard of causation is inapplicable to any evaluation of the equal involvement defense, the First Circuit still erred because *Bateman Eichler* and its progeny compel the conclusion that there was insufficient evidence to support submission

of the defense to the jury and because recognition of the defense would impede effective enforcement of the antitrust laws.

Even in the absence of a "but for" standard of causation, the trial record establishes that petitioner's involvement in the public ownership ban was neither equal nor complete. The NFL developed that ban and imposed it on the former members of the AFL; league officials and the league's Finance Committee decided to maintain it. Petitioner's role was, at best, one of acquiescence in league policies until the mid-1980s. As a result, petitioner was not an "active, voluntary participant in the unlawful activity that is the subject of the suit" and the facts do not present an instance where "the degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater . . .." *Pinter v. Dahl*, 486 U.S. 622, 636 (1988).

Indeed, petitioner's level of involvement can be usefully contrasted with the levels of involvement at issue in antitrust cases decided since *Bateman Eichler* where the defense has been accepted.

In *General Leaseways*, for example, the Seventh Circuit upheld a jury verdict for the defendant, saying the complete involvement defense was applicable because the plaintiff had not only supported the location and nonaffiliation restrictions of the association that were at issue, but had also: (1) initiated a complaint seeking to impose sanctions against an association member that violated the location rule; (2) voted against any lifting of that rule for certain locations; (3) continued to support the rules in question before the association, even after obtaining a preliminary injunction from the trial court and did so well into the period for which it sought damages; and (4) advised association representatives on how to circumvent the injunction it had just obtained. 830 F.2d at 722-24. In affirming the jury's verdict, the Seventh Circuit noted that the participant who is economically coerced into joining an illegal scheme is not subject to the complete involvement defense. Id. at 716, 725.

Similarly, in the case of *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 754 F.Supp. 1336 (N.D.Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir.), *cert. denied*, 113 S.Ct. 409 (1992) ("*Chicago Sports*")--a case involving a challenge to National Basketball Association ("NBA") rules reducing to 25 and then to 20 the number of superstation-televised games available to any team--there were

also differentiating factors. The plaintiff Chicago Bulls franchise actively voted for the initial reduction to 25 games, never sought to obtain any exemption from that reduction before filing a lawsuit, and never challenged the 25-game restriction until the NBA sought to reduce further the number of televised games to 20. Transcript of Hearing in *Chicago Professional Sports Ltd. Partnership v. NBA* at 6 (N.D.Ill., Jan. 23, 1992) ("*Chicago Sports* Transcript"). Thus, the Chicago Bulls were using the threat of an antitrust suit simply as a bargaining tool to convince the NBA to maintain the 25-game limit. The trial court therefore disallowed the team's damages as to the 25-game limit, but not as to the 20-game limit. *Id.* at 10-11. Moreover, as to the former, the court noted that the second prong of the *Bateman Eichler* test was satisfied, because the team had as its co-plaintiff superstation WGN, which could continue to sue the NBA for damages arising from the 25-game limit. *Id.* at 6-7.

In contrast to the plaintiffs in these cases, petitioner cannot be said to have had complete and substantially equal involvement in the antitrust scheme found by the jury. That scheme was the maintenance and enforcement of the public ownership policy in October of 1987 and thereafter, when petitioner sought to have it changed. It is undisputed that, unlike the plaintiff in *General Leaseways*, petitioner did not support the illegal restraint during that period, and was on record with his desire to modify it. And unlike the plaintiff in *General Leaseways*, he evinced no contrary position after October 27, 1987. On the basis of these facts alone, the trial court's ruling was justified.

A consideration of the record before 1987 only supports this conclusion. Petitioner had no substantially equal responsibility for the creation and establishment of the public ownership policy. It existed within the former NFL long before the merger with the AFL. During the merger negotiations, the decision to perpetuate that policy was made without petitioner's active participation, so that the matter was "put to bed," as Pete Rozelle testified, before the petitioner commenced serving on the Joint Committee that worked on the logistics of the merger.

From 1970 to 1987, it is undisputed that petitioner never was asked to vote on the enforcement of that policy against other league members, or used it to reduce competition, a situation quite unlike *General Leaseways*. When public ownership proposals were presented in 1985, petitioner was also never allowed to vote on them, although he

expressed support for these changes, a situation quite unlike the case involving the Chicago Bulls. These facts only underscore the *in*equality of William Sullivan's participation in the maintenance of that policy.

In short, there was simply no evidence of petitioner's complete, voluntary and substantially equal involvement in the illegal scheme. Even if such involvement were shown, however, the defense is still inapplicable because under *Bateman Eichler*, preclusion of petitioner's suit would substantially inhibit enforcement of the antitrust laws. This is not a situation like the Chicago Bulls case, where a separate co-plaintiff could continue to seek treble damages. The only other plaintiff here was Charles Sullivan, the former owner of the stadium in which the Patriots play home games, and his separate suit was disposed of on summary judgment before the trial. *Sullivan v. Tagliabue*, 828 F.Supp. 114 (D.Mass. 1993), *aff'd*, 25 F.3d 43 (1st Cir. 1994).

The First Circuit's response was that the antitrust laws could have been effectively enforced through an action for injunctive relief brought by cross-petitioner in October of 1987. 34 F.3d at 1107-08 n.7; Pet.App. 30a n.7.

However, this rationale is inconsistent with *Bateman Eichler*. That case was a private damage action. 472 U.S. at 301. This Court said that allowing a tippee to sue corporate insiders for damages under the federal securities laws provided incentives for such private enforcement and maximized the deterrent impact upon securities violators. *Id.* at 316-17. The Court was clearly focussing on the importance of a *damage* remedy for effective enforcement; it spoke of the need to expose lawbreakers to civil penalties and the "deterrent pressure of potential sanctions." *Id.*

Similar concerns had been voiced earlier by this Court in *Perma Life*. The majority opinion by Justice Black referred to how a private damage action poses an "ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." 392 U.S. at 139. Furthermore, Justice Black noted that "the plaintiff who reaps the reward of treble damages" is encouraged by the antitrust laws to file suit in order "to further the overriding public policy in favor of competition." *Id.* Justice White, in his concurring opinion, likewise referred to "the aims and purposes of §4 of the Clayton Act . . ., which gives treble-damage recovery to the private plaintiff injured by conduct

which violates the antitrust laws." *Id.* at 143. Similarly, Justice Fortas' concurring opinion spoke of antitrust plaintiffs' "right to recover in their own interest and as 'private attorneys general' to enforce the antitrust laws . . .." *Id.* at 148. Thus, the Court in *Perma Life* focussed on the importance of the treble *damage* remedy for antitrust enforcement. *See also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (discussing compensatory and deterrent aspects of treble damage remedy in antitrust cases).

The *Chicago Sports* case cited previously is consistent with these underlying principles. That antitrust suit was brought by both the Chicago Bulls basketball team and superstation WGN, seeking damages and injunctive relief against, *inter alia*, the National Basketball Association's 25-game limit on telecasts by superstations. In its opinion granting a final injunction, the district court held that the Bulls had standing to sue under *Perma Life*. *Chicago Sports*, 754 F.Supp. at 1355. At the damage phase of the case, the district court, under the NFL's theory, should have held that the Bulls could not collect any damages, for the simple reason that antitrust enforcement was fully vindicated through issuance of the injunction. The court, however, denied any claim for damages by the Bulls as to the 25-game limit only after assuring itself that co-plaintiff WGN would still pursue monetary relief in connection with that restriction. The district court perceived no restriction on antitrust enforcement *only* because of WGN's ability to go forward and obtain monetary relief, something that is not present in this case. *Chicago Sports* Transcript, pp. 6-7. Thus, effective antitrust enforcement here requires the ability to sue for treble damages.

Moreover, the First Circuit's rationale places a plaintiff such as petitioner in a "Catch-22" situation. Had he sued for injunctive relief under the antitrust laws in October of 1987, there is a strong possibility that the NFL would have successfully asserted that such relief should have been denied on the ground that plaintiff had an adequate legal remedy in the form of damages. This argument was, in fact, advanced to and accepted by the Ninth Circuit with respect to the Los Angeles Raiders' request for a preliminary injunction against the NFL's franchise relocation rule. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202-03 (9th Cir. 1980). On the other hand, once petitioner sold his team and lost the ability to sue to enjoin a continuing violation against him, the NFL takes the position that a damage remedy is barred pursuant to the complete involvement defense because plaintiff could

have sought an injunction. A potential result of this double-sided strategy, if it is allowed to succeed, is that the league's antitrust violations may go unremedied, something that would surely "interfere with effective enforcement" of the Sherman Act.

For all the foregoing reasons, the trial court was correct in not instructing the jury on the issue of equal involvement, and this Court should grant the cross-petition for certiorari and reverse the First Circuit on this issue.

III. THE COURT SHOULD CLARIFY THE LAW AS TO CONSIDERATION OF ALLEGED PROCOMPETITIVE BENEFITS IN MARKETS OTHER THAN THE RELEVANT MARKET.

Numerous courts have made the point that an analysis of the reasonableness of a challenged restraint usually requires a balancing of its anticompetitive and procompetitive aspects within the relevant market. Thus, in *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1392 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984), the Ninth Circuit said the "relevant market provides the basis on which to balance competitive harms *and benefits* of the restraint at issue." Emphasis added.[5] Other NFL antitrust cases are in accord. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C.Cir. 1978) (procompetitive effects of challenged restraint on the playing field could not be weighed against its anticompetitive effect in the players' market); *McNeil v. NFL*, 1992-2 Trade Cas. (CCH) ¶69,982 at 68,771 (D.Minn. 1992) (jury must decide whether "harmful effects on the competition for professional football players' services outweigh any beneficial effects *for that competition*"; emphasis added); *Brown v. Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶69,747 at 67,405 & n.14 (D.D.C.), *recon. denied*, 812 F.Supp. 237, 238-39 (D.D.C. 1992) (appeal pending) (league concern over stashing of players was not a justification relating to salary

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[5] To the extent the Ninth Circuit in this case might be viewed as considering indirect procompetitive benefits, it may be because the evidence on the relevant market was never placed before the jury and the court ultimately found a market determination in that case to be imprecise and not all-important. 726 F.2d at 1392, 1394.

restraint).[6] Indeed, as petitioner (and the trial court) argued, in the *NCAA* case, this Court analyzed procompetitive justifications in the relevant market of the telecasting of college football games, which was the market where the restraint operated. 468 U.S. at 114-15 & n.55. The justification of competitive balance was considered only to the extent that it had procompetitive effects in that market. The Court specifically rejected defendants' argument that the NCAA's television plan assisted in promoting the overall production of college football games, a justification which was asserted to increase output in the related market of live attendance of such games. *Id.* at 116-17.

The First Circuit, however, found this area of law to be a "deceptive body of water" "muddied" by the *NCAA* opinion. 34 F.3d at 1111; Pet.App. 37a. It disagreed with petitioner's view of *NCAA*, saying that "it is impossible to tell whether the Court was consciously applying the rule of reason to include a broad area of procompetitive benefits in a variety of markets, or whether the Court was simply not being very careful and inadvertently extended the rule of reason past its proper scope." 34 F.3d at 1111 n.9; Pet.App. 38a n.9. The First Circuit likewise found that lower court authority had either not squarely addressed the issue or was arguably in conflict. 34 F.3d at 1111-12; Pet.App. 38a-39a. While not trying to resolve the matter definitively, the First Circuit deemed it advisable to "give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices" and thus advised the trial court on remand to either not instruct the jury to weigh the benefits and the detriments of the public ownership ban in the context of the relevant market or to allow the jury to consider "evidence of benefits flowing indirectly from the public ownership policy that have a beneficial impact on competition in the relevant market itself." 34 F.3d at 1112-13; Pet.App. at 40a-41a.

As the First Circuit's opinion makes clear, this case presents an important issue on the type of analysis undertaken pursuant to the Rule

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[6] Contrary to any suggestion by the First Circuit, this Court's opinion in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) did not hold otherwise. The Court there merely balanced "the competitive repercussions of a vertical restraint on the intrabrand and interbrand components of the relevant market." *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1394 (5th Cir. 1983).

of Reason that could benefit from a clarification by this Court, especially given the dispute over the proper interpretation of the *NCAA* opinion. Therefore, for this reason as well, the cross-petition for certiorari should be granted.

CONCLUSION

For the reasons stated above, the Court should grant the cross-petition for a writ of certiorari to the Court of Appeals for the First Circuit.

Respectfully submitted,

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January 9, 1995

APPENDIX A

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

WILLIAM H. SULLIVAN, JR., Plaintiff, v. NATIONAL FOOTBALL LEAGUE and MEMBERS OF THE NATIONAL FOOTBALL LEAGUE, Defendants.	CIVIL ACTION NO.: 92-10592-H

MEMORANDUM

November 29, 1993

HARRINGTON, D.J.

Defendants, in their Memorandum in Support of Their Motion for Judgment as a Matter of Law, or Alternatively for a New Trial, cite as error the Court's refusal to instruct the jury as to the effect of the so-called "Murray option." A substantial amount of evidence relating to the nature and effect of the "Murray option" was admitted during trial as relevant to the issues of causation and damages. Further, that evidence was argued on summation by plaintiff and defendants. This Court adheres to the practice of not commenting on any evidence admitted during trial in its instructions to the jury. In accordance with that practice, the Court did not comment on the evidence in this case.

During the course of the trial, evidence was introduced that clearly defined and explained the nature of options generally and the "Murray option" specifically. Consequently, the legal definition of "option" was never in dispute. Rather, the issue in contention involved the ultimate effect or consequences of the "Murray option" on Plaintiff Sullivan's proposed public offering. As a result, the crucial issues before the jury were (1) whether Murray would have attempted to exercise his option before it converted to a right of first refusal on December 1, 1987, (2) whether Murray was financially capable of exercising his option, (3) whether Murray would have qualified for franchise ownership under the NFL's rules of ownership eligibility, and (4) if Murray had in fact exercised his option, would he have done so in a manner that would have precluded Plaintiff Sullivan's proposed public offering. These are questions of fact which the parties argued fully and the jury decided.

Defendants also cite as error Verdict Form Question No. 4, which, in effect, instructed the jury to balance any harmful effects on competition within the relevant market against any procompetitive effects on competition within the same market. Defendants contend that the benefit the jury may consider need not be in the same market as the harm against which the benefit is to be balanced.

Defendants' argument, however, is unpersuasive. Case law clearly indicates that in antitrust suits "the relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue." Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1392 (9th Cir. 1984). See also McNeil v. National Football League, 1992-2 Trade Cas. at 68,771 (jury instructed to decide whether "harmful effects on the competition for professional football players' services outweigh any beneficial effects for that competition"). In other words, the defendant's impact on competitive conditions is measured within the parameters of a single definable market. See Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979).

In Smith v. Pro Football, Inc., a professional football player challenged the NFL's player draft system as a violation of Section 1 of the Sherman Antitrust Act. 593 F.2d 1173 (D.C. Cir. 1978). In rejecting the defendants' argument that the draft's ultimate procompetitive effects on the entertainment market offset the draft's

anticompetitive evils, the United States Court of Appeals for the District of Columbia reasoned that a challenged restraint's "anticompetitive effects" and "procompetitive effects" must be comparable in order "to net them out" in the usual rule-of-reason balancing. Id. at 1186. Similarly, in Brown v. Pro Football, Inc., the United States District Court for the District of Columbia rejected several of defendants' procompetitive claims as plainly irrelevant because they lacked correlation with the challenged restraint. 812 F.Supp. 237, 238 (D.D.C. 1992).

The claim made by defendants in the instant case is similar to those proffered in Smith and Brown. Defendants argue that their Policy against Public Ownership prevented dividend-interested stockholders from influencing League decision making, thereby promoting a better NFL product that, in turn, benefitted competition between the NFL and other forms of entertainment. Following the logic of Smith and Brown, defendants' procompetitive claim lacks correlation with the Policy's anticompetitive effects and therefore does not lend itself to analysis under the rule of reason. A contrary view would require the jury to balance the alleged anticompetitive and procompetitive effects of the NFL's Policy against Public Ownership in every definable market. Such a balancing would be impossible to complete. Accordingly, the Court finds that the relevant market is the focal point on which the rule of reason balancing is conducted.

Defendants cite National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984), as support for their argument. Defendants' reliance on that decision, however, undermines their position. In National Collegiate Athletic Ass'n, the University of Oklahoma and University of Georgia challenged, as violative of the Sherman Antitrust Act, the NCAA's imposition of a restrictive television broadcasting plan for football games upon all its member universities. Id. at 88. In applying the rule of reason, the Supreme Court analyzed the defendant's procompetitive claims within the relevant market of the telecasting of college football games--the same market in which the

restraint operated. Id. at 114-15. Hence, the effects of the restraint, both beneficial and detrimental to competition, were comparable and therefore capable of being balanced within the rule of reason framework.

EDWARD F. HARRINGTON
United States District Judge

FILED
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No. 94-1206

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM H. SULLIVAN, JR.,
Cross-Petitioner,
v.
NATIONAL FOOTBALL LEAGUE, *et al.*,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. When one member of a professional football league states no objection to a league policy over a period of many years, actively relies on the policy and supports its validity in order to carry out a financial transaction beneficial to him, and then sues the league and its other members for antitrust damages, claiming that the policy is an unreasonable restraint of trade, did the Court of Appeals err in deciding that a jury may find that the member's "equal involvement" in the policy is a defense to the suit?

2. Did the Court of Appeals err in deciding that, when an antitrust jury is balancing anti- and pro-competitive effects of a challenged restraint, it should not be precluded from considering the restraint's pro-competitive effects in a market related to the market in which the anti-competitive effects allegedly occurred?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1206

WILLIAM H. SULLIVAN, JR.,
Cross-Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Despite cross-petitioner's assertion that "there is not a scintilla of evidence" that he "did anything more than acquiesce in [the] continued existence [of the NFL policy he now challenges] up to the mid-1980s" (Cross-Pet. 6), no one bears greater responsibility for the maintenance of the policy than he; and no one is more properly subject to the antitrust "equal involvement" defense than he. Cross-petitioner William H. Sullivan was the only National Football League ("NFL") owner who had personal experience with the circumstance to which the policy is addressed, the only NFL owner who relied expressly on the policy to promote his own personal interests, and the only NFL owner who defended the reasonableness of the policy in sworn testimony in open court in a prior case.

There is no conflict in the circuits on the contours of the "equal involvement" defense, let alone in a case involving these circumstances. Nor does the cross-petition present any issue regarding the balance of pro- and anti-competitive effects on competition that meets the Court's requirements for certiorari.

COUNTERSTATEMENT OF THE CASE

The Statement of the Case in the cross-petition is incomplete and argumentative, and it contains numerous "misstatements of fact," *see* Sup. Ct. R. 15.1.

Statement of Relevant Facts.

The American Football League ("AFL") was formed in 1959 and began play in the 1960 football season. William Sullivan, the cross-petitioner, was the original owner of the AFL Boston Patriots. He financed the start-up of the new venture by taking in partners, who shared the voting ownership, and by selling non-voting stock to the public. (Trial Ex. 2001.)[1]

The AFL adopted many of the policies and procedures then being followed by the established NFL, including those relating to governance of the league and forms of ownership of league members. At the time the AFL was formed, neither league had a formal policy relating to whether member clubs could be publicly owned, although the NFL later developed a policy disfavoring such ownership. (Trial Ex. 5.)

In 1966, representatives of the two leagues had some private discussions about combining them into a single league. The climate appeared favorable, and each league then appointed a three-member committee to represent

[1] All of the trial exhibits referenced herein were included in an Appendix of Trial Exhibits presented to the Court of Appeals for the First Circuit. References to "J.A." refer to the Joint Appendix presented to the Court of Appeals.

its interests in the negotiations that followed. (Trial Ex. 1.) Sullivan was one of the three AFL representatives. After further negotiations, tentative agreements were reached.[2] After Congress approved legislation exempting the consolidation of the two leagues from the antitrust laws,[3] Sullivan and the two other members of the AFL committee executed a written agreement with their NFL counterparts. The agreement was to govern the relationships among all the teams until 1970, the earliest date the consolidated league could be fully implemented. (Trial Ex. 2.)[4]

Among the terms addressed by the committees on which Sullivan served was the policy on public ownership. It was agreed that the NFL's policy would be applied to all new franchises and to all changes of ownership of existing franchises after February 1, 1967. (Trial Ex. 2.) By framing the policy this way, Sullivan was able to maintain the existing public ownership of his club.

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[2] There was a dispute in the trial testimony about the extent to which the chair of the AFL negotiating committee, Lamar Hunt, kept the other two members informed of meetings he had with an NFL representative. Hunt testified that he regularly conferred with and obtained the agreement of the other two AFL committee members—Sullivan and Ralph Wilson—before agreeing to anything on behalf of the AFL. (J.A. 465.) Sullivan testified that he did not know all the details of Hunt's activities (J.A. 509-510), although his son, Charles Sullivan, a former Patriots officer, referred to his father as "the central figure in the negotiating of the merger with the National Football League." (Trial Ex. 1472 at 5-56.)

[3] *See* Pub. L. 90-800, 80 Stat. 1515 (1966); *see also Professional Football League Merger: Hearings on S. 3817 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966) (admitted as Trial Ex. 3).

[4] In the interim, a joint committee, consisting of Sullivan and five others, was appointed to develop the principles under which the consolidated league would operate. The committee met on numerous occasions over several years. (Trial Ex. 1.)

The single league was formed in 1970. On several occasions thereafter, the members reviewed the League's ownership policies. (Trial Exs. 9, 60.) Some were changed. Most, including the public ownership policy, were not. No members, or at most only a few, were interested in making any such change. (*E.g.*, Trial Ex. 224.)

At no time in these discusisons did Sullivan ever object to the public ownership policy or suggest that it be changed. (9/17/93 Tr. at 160.)

In 1976, Sullivan bought out the other voting shareholders of the Patriots, using funds he borrowed on condition that he acquire ownership of the publicly held non-voting shares as well.[5] He accomplished this objective through a "cash freeze-out merger" under Massachusetts law. *See Coggins* v. *New England Patriots Football Club, Inc.*, 492 N.E.2d 1112, 1116 (Mass. 1986). The proxy statement he issued explicitly stated, under "Reasons for the Merger," that the transaction would bring the club, "on a voluntary basis, into compliance with NFL policy which is opposed to public ownership of" member clubs. (Trial Ex. 1233 at 4.) Explaining the word "voluntary," the proxy statement added that "[t]here is no legal obligation on the part of the Patriots to eliminate public ownership and the Patriots do[] not foresee any attempt by the League to require the elimination of public ownership." (*Id.*) The proxy statement reprinted in full a letter from Pete Rozelle, then the Commissioner of the NFL, which Sullivan had asked Rozelle to write. The letter explained that the principal reason for the NFL's public ownership policy is to ensure that club owners are able to make decisions in the best interests of the

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[5] By this time, the team had begun playing its home games in a stadium located several miles outside Boston and had changed its name to the New England Patriots.

League and its product without worrying about the short-term dividend interests of stockholders of member clubs.[6]

Sullivan stoutly embraced the NFL policy and the reasons for it. In the 1976 proxy statement itself, he said:

> In the judgment of the Patriots' Board of Directors, it is becoming increasingly difficult for management to make decisions which will best serve the corporation's objectives if management must attempt to satisfy the often competing responsibilities which it has to public stockholders, on the one hand, and to the League's other twenty-seven member clubs, on the other. (Trial Ex. 1233 at 6.)

Several years later, in a proceeding brought by shareholders who had opposed the 1976 transaction, Sullivan testified under oath that he had a "long-held conviction that what was in the best interests of the league was a more important factor than what was in the best interests of the stockholders, and that had put me in a constant conflict in my own mind." (Trial Ex. 1253 at 5-128.)[7]

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[6] Former Commissioner Rozelle's letter stated specifically:

> The NFL is essentially a joint-venture operation among its clubs directed at the presentation of a form of public entertainment. In furtherance of this common objective, representatives of the member clubs, acting collectively, are regularly required to decide issues of interest to the League at large. That decision-making procedure is impeded if the individuals representing the member clubs are obliged to concern themselves with the immediate dividend interests of their stockholders or are required to consult with or refer back to their boards of directors or to their stockholders decisions affecting overall League interests. Accordingly, the League has an established policy of requiring that control of each NFL franchise be placed in the hands of a single individual having final authority to act for the club on all League matters. (Trial Ex. 1233 at 5.)

[7] In light of the overwhelming evidence as to the purpose of the NFL's public ownership policy, it is not surprising that the First

Despite these repeated reaffirmations of the NFL's policy against public ownership, Sullivan raised the idea of again selling stock in the Patriots to the public. He presented the idea, without prior notice, at a League meeting on October 27, 1987. (Trial Ex. 1001A.) By that time, the club was in dire financial straits, having run up several consecutive years of losses. (Trial Ex. 1615.) Sullivan asserted that because a highly successful professional basketball franchise, the Boston Celtics, had sold a minority interest in the club to the public for a substantial sum, he could do likewise with the Pātriots. He asked, as a favor to him, that the public ownership policy be waived or modified. (Trial Ex. 33A.) At no time did he suggest that the policy was anticompetitive or that it raised any legal question of any kind. After discussion at the meeting, the matter was tabled (with Sullivan's full agreement). (J.A. 1419-24.) It was never raised again, except as one of the topics at a meeting among Patriots officers and League officials a few weeks later that covered several aspects of the club's dismal financial condition. As a result of this latter meeting, Commissioner

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Circuit agreed that the policy enhances the NFL's ability to produce its joint product:

> [W]e accept the NFL's claim that its public ownership policy contributes to the ability of the NFL to function as an effective sports league, and that the NFL's functioning would be impaired if publicly owned teams were permitted, because the short-term dividend interests of a club's shareholder would often conflict with the long-term interests of the league as a whole. That is, the policy avoids a detrimental conflict of interests between team shareholders and the league.

Sullivan v. *National Football League*, 34 F.3d 1091, 1102 (1st Cir.), *petition for cert. filed*, 63 U.S.L.W. 3487 (1994) (No. 94-1048). The Court of Appeals' opinion is reprinted in the Appendix to the Petition for Certiorari filed by the NFL defendants in No. 94-1048 ("Pet. App.") 1a-43a.

The failure of the Court of Appeals to give proper weight to this finding is one basis for the Petition for Certiorari in No. 94-1048.

Rozelle appointed a special committee to help the Patriots find a solution. Eventually, a buyer was found and the club was sold in October 1988. (Trial Ex. 1287.)

Statement of Proceedings.

In 1991, Sullivan brought this antitrust case. He claimed that the NFL policy on public ownership harmed competition in the "market" for ownership interests in NFL franchises and that it lacked any countervailing beneficial effect on competition. He alleged that the League had blocked his effort to sell Patriots stock to the public and that, but for this, he would today be the majority owner of the Patriots, which would be a more valuable franchise. (J.A. 100-07.)

The case was tried to a jury in 1993, which found for Sullivan. After post-trial proceedings, the district court entered judgment for him in the amount of $51 million.

Cross-respondents, who were defendants below, appealed. The Court of Appeals for the First Circuit rejected all arguments that were aimed at the entry of judgment for the defendants, but it did vacate the judgment and order a new trial on five independent grounds. *See* note 9, *infra*.

Sullivan raises two of those grounds here:

1. *Equal involvement.* One of the grounds on which the Court of Appeals ordered a new trial related to the "equal involvement" defense. The NFL defendants had raised this defense in a motion for summary judgment, and they raised it again in a motion for a directed verdict at the close of the plaintiff's evidence at the trial. The district court denied both motions without explanation. (Pet. App. 49a-52a.) In addition, the district court refused to instruct the jury on the defense. The Court of Appeals held that this was prejudicial error requiring re-

versal and a new trial. Citing this Court's decision in *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299 (1985), the Court of Appeals held that

> A plaintiff's "complete, voluntary, and substantially equal participation" in an illegal practice under the antitrust laws precludes recovery for that antitrust violation. . . . In order to establish an "equal involvement" defense, an antitrust defendant must prove, by a preponderance of the evidence, that the plaintiff bears at least substantially equal responsibility for an anticompetitive restriction by creating, approving, maintaining, continually and actively supporting, relying upon, or otherwise utilizing and implementing, that restriction to his or her benefit. (34 F.3d at 1107; Pet. App. 29a-30a.) (citations omitted.)

"In this case," the court concluded, the evidence "is sufficient for a reasonable jury to conclude that Sullivan bears substantially equal responsibility for the NFL's public ownership policy because Sullivan helped adopt the policy, he relied upon it, and he actively supported it." (34 F.3d at 1108; Pet. App. 31a.)

2. *Balancing markets.* A second error the Court of Appeals cited stemmed from the district court's verdict form. The form allowed the jury, if it found that the NFL's public ownership policy harmed competition in the relevant market, to determine as well if the policy provided any benefit to competition and to balance the two effects. However, the court recognized that the verdict form "may have misle[d] the jury into thinking that it was precluded from considering the NFL's justifications for its ownership policy" (34 F.3d at 1113; Pet. App. 41a), which included pro-competitive effects in a broader entertainment market. After reviewing at length the cases on balancing harm and benefit in different markets—including this Court's decision in *National Collegiate Ath-*

letic Ass'n v. *Board of Regents*, 468 U.S. 85 (1984)—the First Circuit concluded that the law at the very least requires the jury to balance harm and benefit in circumstances where the market in which the harm was found was related to the market in which the benefit occurred.[8] (34 F.3d at 1111-13; Pet. App. 37a-41a.)[9]

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[8] The Court of Appeals stated that "to the extent the NFL's policy strengthens and improves the league" the result of the policy may be more "valuable teams," which in turn strengthens "competition in the market for ownership interests in NFL clubs"—the market in which, Sullivan contended, competition was harmed. 34 F.3d at 1113; Pet. App. 41a.

[9] These were only two of the grounds on which the Court of Appeals reversed the district court and ordered a new trial.

Another ground for the new trial ruling was the repeated references by Sullivan's counsel, in front of the jury, to prior antitrust cases that had resulted in verdicts or decisions against the NFL, none of which had any relevance to the reasonableness of the NFL's public ownership policy. The First Circuit described such references as "inherently prejudicial." 34 F.3d at 1113-14; Pet. App. 41a-43a.

Yet another ground on which the First Circuit ordered a new trial was that the district court had deprived the defendants of yet another "key defense" when it refused to instruct the jury on the legal effect of a third party's option to buy the Patriots and excluded evidence of the option-holder's intentions. The Court of Appeals declared that "if Sullivan did not have the legal right to sell Patriots stock to the public, he did not suffer any harm from the NFL's ownership policy and the NFL would have been entitled to judgment in its favor." 34 F.3d at 1110-11; Pet. App. 35a-36a.

Finally, the court held that, in view of the defendants' position that Sullivan simply dropped his public-sale idea on his own, the district court erred by failing to instruct the jury that it had to determine that the plaintiff must prove that the NFL actually enforced its public ownership policy against him. 34 F.3d at 1109-10; Pet. App. 33a-35a.

REASONS TO DENY THE WRIT

Sullivan as cross-petitioner seeks review of the decision of the Court of Appeals on two of the five points the court cited in ordering a new trial in this case.

The cross-petition does not satisfy the standards for certiorari set forth in Sup. Ct. Rule 10.1, as there is no conflict among the circuits or with this Court's decisions on either point, and the cross-petition provides no other reason for the Court to address either point. In any event, no action by this Court in connection with the cross-petition could result in judgment for Sullivan.[10]

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR WITH THIS COURT'S DECISIONS ON THE "EQUAL INVOLVEMENT" DEFENSE.

The cross-petition contends that the circuits are in conflict with regard to the standard to be applied in evaluating an "equal involvement" defense and that, in any event, the court below misapplied the pertinent decisions of this Court.

That is not correct.

In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), this Court rejected the application in antitrust cases of the common-law defense of *in pari delicto*. In a series of concurring opinions in that case, however, "five Justices concluded . . . that where a plaintiff truly bore at least substantially equal responsibility for the violation, a defense based on such fault—whether or not denominated *in pari delicto*—should be recognized in antitrust litigation." *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 308-09 (1985).

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[10] In this regard, the cross-petition differs from the petition for certiorari filed by the NFL defendants in No. 94-1048. The NFL's petition, if granted, could result in final judgment for the defendants. *Cf. Virginia Military Institute* v. *United States*, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring in the denial of *certiorari*).

Lower courts, both before and after *Bateman* was decided, generally developed a fairly uniform set of criteria for judging whether an "equal involvement" defense could be made out.[11] Before *Bateman*, the one possible exception was the Ninth Circuit, which, according to the cases cross-petitioner cites, had suggested that the "equal involvement" defense is available "only when the illegal conspiracy would not have been formed but for the plaintiff's participation." *Javelin Corp.* v. *Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977).[12]

Then this Court decided *Bateman* in 1985 and thereafter *Pinter* v. *Dahl*, 486 U.S. 622 (1988). It is now clear that a plaintiff is barred from recovering damages under regulatory statutes when he has been "an active, voluntary participant in the unlawful activity that is the subject of the suit." *Pinter*, 486 U.S. at 636. The Court in *Pinter* concluded that it is appropriate to "focus[] on

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[11] *See Premier Elec. Constr. Co.* v. *Miller-Davis Co.*, 422 F.2d 1132, 1138 (7th Cir.) (barring recovery where plaintiff bears equal "responsibility for creating and establishing [the] illegal scheme"), *cert. denied*, 400 U.S. 828 (1970); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.3d 3, 15-16 (4th Cir. 1971) (barring recovery where plaintiffs "mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restrain of trade"); *CVD, Inc.* v. *Raytheon Co.*, 769 F.2d 842, 856 (1st Cir. 1985) (barring recovery for plaintiff's "complete, voluntary, and substantially equal participation in an allegedly illegal scheme"), *cert. denied*, 475 U.S. 1016 (1986); *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 830 F.2d 716, 725 (7th Cir. 1987) (barring recovery for plaintiff who bears "a substantially equal responsibility for creating and maintaining the unlawful contract").

[12] *See also Southwest Marine, Inc.* v. *Campbell Indus.*, 732 F.2d 744, 746 (9th Cir.) (declining to apply "but for" test where "truly complete" participation by corporation's officer could not be attributed to plaintiff corporation), *cert. denied*, 469 U.S. 1072 (1984); *THI-Hawaii, Inc.* v. *First Commerce Fin. Corp.*, 627 F.2d 991, 996 (9th Cir. 1980) (finding plaintiff "completely involved in the formation of the allegedly illegal agreement").

the extent to which the plaintiff and the defendant cooperated," not only "in developing" the illegal scheme, but also in "carrying [it] out." 486 U.S. at 637.

The Ninth Circuit has not had occasion to address the "equal involvement" defense since *Bateman* and *Pinter* were decided. Nor has the Ninth Circuit had occasion to address the defense in a factual setting comparable to the situation presented in this case, *i.e.*, a case in which a plaintiff voluntarily—that is, not under any economic or other compulsion—joins an existing association that has an arguably anticompetitive restraint as part of its rules, never protests the restraint either initially or when it is periodically reviewed and reaffirmed, and affirmatively relies on the restraint when it is in his interest to do so. Courts that have addressed this fact pattern since *Bateman* have reached uniform results: The Seventh Circuit has held that in such a situation the defense is established. *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 830 F.2d 716 (7th Cir. 1987). The First Circuit, in the present case, held likewise. 34 F.3d at 1107-09; Pet. App. 29a-33a.[13] Moreover, as noted above, *Pinter* establishes beyond doubt that not only "developing" but also "carrying out" the restraint is germane to the analysis. 486 U.S. at 637. Thus, the decision below was plainly correct on this point.[14]

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[13] *See also Chicago Professional Sports Ltd. Partnership* v. *National Basketball Ass'n*, No. 90-C-6247 (N.D. Ill.) (transcript of proceedings, January 23, 1992) (denying damages recovery to Chicago Bulls because it had acquiesced and participated in the restraint it was then challenging).

[14] Sullivan cannot, as he suggests, evade the "equal involvement" issue by "withdrawing" from the alleged conspiracy at the last minute. Even if one could conclude that Sullivan ever withdrew from the alleged conspiracy, he did so—at the earliest—in October 1987, when the public ownership policy first became personally inconvenient for him. Such a last-minute withdrawal is insufficient under equal involvement and general conspiracy principles. *See General Leaseways*, 830 F.2d at 723 (plaintiff's equal participation was not minimized by the fact that he "opposed the nonaffiliation

There is no conflict between the First (and Seventh) Circuit's approach and the approach of any other Circuit on this point. Now that this Court has decided both *Bateman* and *Pinter*, there is no basis to think that the Ninth Circuit would adhere to its previous position that a plaintiff is barred only when he was a crucial factor in the *formation* of the restraint. *See* 34 F.3d at 1108 n.8 ("There is no evidence of such a rigid 'but for' requirement in the Supreme Court's formulation of the equal involvement defense in *Bateman*"). If the Ninth Circuit ever adheres to its previous formulation of the defense, that will be the time for this Court to resolve whatever conflict is then perceived to exist. There is no reason for the Court at this time to review the "equal involvement" defense.

Moreover, the only effect this Court could have on this case by granting the cross-petition would be to influence the instructions to be given to the jury in the event the new trial ordered by the Court of Appeals goes forward.[15]

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rule only when *he* was restrained by it") (emphasis in original); *United States* v. *Herron*, 825 F.2d 50, 59 (5th Cir. 1987) (last-minute withdrawal from conspiracy "does not prevent a conspiracy conviction of the withdrawing party").

[15] Contrary to Sullivan's argument, adoption of the "but for" formulation would not dispose of the case in his favor. As noted, Sullivan was on the AFL committee that negotiated the single-league agreement in 1966 and was able to exclude his own club's public ownership from the policy, and he was a member of the Joint Committee that developed the rules and policies under which the new, single league would operate. (Trial Exs. 1-2.) He never suggested that the public ownership policy was inappropriate, let alone unlawful. The equal involvement defense is unavailable as a matter of law only when the plaintiff is "a party who has vigorously protested the inclusion of an illegal provision only to be overwhelmed by a party in a superior bargaining position." *THI-Hawaii, Inc.* v. *First Commerce Fin. Corp.*, 627 F.2d 991, 996 (9th Cir. 1980); *see also CVD, Inc.* v. *Raytheon Co.*, 769 F.2d 842, 856 (1st Cir. 1985) (plaintiff not barred because he was "overwhelmed by a party in a superior bargaining position"), *cert. denied*, 475 U.S. 1016 (1986). As the First Circuit stated in this case, "the [district]

Therefore, this is not in any event an appropriate case for the exercise of this Court's certiorari jurisdiction. *See Black* v. *Cutter Laboratories, Inc.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

II. THERE IS NO REASON FOR THE COURT TO ADDRESS THE MARKET BALANCING ISSUE.

Sullivan makes no claim in his cross-petition that the decision below conflicts with any decision of this Court or of any other circuit with respect to the balancing of pro- and anti-competitive effects of a challenged restraint. The decision below was unquestionably correct, and the cross-petition does not assert otherwise. Instead, Sullivan simply suggests that this is an issue on which the Court should "clarify the law."

The cross-petition, however, offers nothing to "clarify." All of the cases on this issue hold that pro-competitive effects in one market may be balanced against anti-competitive effects in a different market. *See National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85, 117-18 (1984) (weighing beneficial effect on competition among "amateur athletic teams" against alleged injury to competition in market for live college football telecasts); *Los Angeles Memorial Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1399 (9th Cir.) ("the jury was not constrained to ascertain the reasonableness of [the challenged conduct] solely in view of the internal NFL market"), *cert. denied*, 469 U.S. 990 (1984); *McNeil* v. *NFL*, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,772 (D. Minn. 1992) (permitting jury to consider benefits in market for "NFL football product" generally although injury to competition was allegedly in the market for player

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court's view that the NFL imposed the ownership policy on the AFL owners, rendering their participation involuntary, is largely unsupported by the record." 34 F.3d at 1109; Pet. App. 32a. Plainly, Sullivan would not have been entitled to a directed verdict on this issue even if the "but for" test were followed.

services).[16] *See also National Football League* v. *North American Soccer League*, 459 U.S. 1074, 1076-79 (1982) (Rehnquist, J., dissenting from the denial of *certiorari*) (considering benefits to cross-ownership policy in general "entertainment" market although competition allegedly harmed in a different market); *accord* VII P. Areeda, ANTITRUST LAW ¶ 1502 at 372 (1986); ANTITRUST LAW DEVELOPMENTS (THIRD) 53 (A.B.A. Section on Antitrust Law 1992).

The Court of Appeals in this case took a very cautious approach. It held that the NFL's pro-competitive arguments would, if accepted, strengthen the value of NFL franchises, which would in turn be relevant to a market that relates to the market in which the NFL public ownership policy allegedly harms competition. In these circumstances, the court held—as has every other court that decided the issue—that benefit in one market may be balanced against harm in a different market. (34 F.3d at 1112-13; Pet. App. 40a-41a.)

The arguments Sullivan offers, therefore, provide no basis for this Court to address the law on this point. In any event, there is not even a suggestion that this Court could reach a decision that would result in the entry of judgment in Sullivan's favor.

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[16] The two additional cases Sullivan cites did not decide this issue. *See Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1186-89 (D.C. Cir. 1978) (rejecting argument that "competitive balance" was a pro-competitive effect that had to be considered at all and thus never reaching the different-markets point); *Brown* v. *Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 at 67,405, *recons. denied*, 812 F. Supp. 237, 238-39 (D.D.C. 1992) (following *Smith*), *appeal pending*, No. 93-7165 (D.C. Cir.).

CONCLUSION

The Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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